UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
MINNESOTA METAL FINISHING, INC.,	**)**	**Docket No. RCRA-05-2005-0013**
	)	
Respondent	**)**	

ORDER ON MOTIONS TO SUPPLEMENT PREHEARING EXCHANGE AND COMPLAINANT'S MOTION IN LIMINE

I. Background

Respondent Minnesota Metal Finishing, Inc. ("MMF") is a Minnesota corporation which owns and operates a plant located at 909 Winter Street NE, Minneapolis, Minnesota, which engages in the business of plating steel with zinc and anodizing aluminum. This action was initiated on August 26, 2005 by the U.S. Environmental Protection Agency Region 5 ("Complainant"), filing an Administrative Complaint and Compliance Order charging Respondent with five counts of violating the Resource Conservation and Recovery Act ("RCRA"), as amended, 42 U.S.C. §§ 6901 *et seq.*, and certain federal and state regulations promulgated to implement RCRA, codified as 40 C.F.R. Parts 260 through 279, and Minnesota Rules ("Minn. R.") 7045.0292 and 7045.0450 through 7045.0551. In the course of its operations, Respondent generates more than 1,000 kilograms per month of hazardous waste, including solid plating waste and spent plating and anodizing bath solutions containing corrosive substances such as sulfuric acid and nitric acid. Consequently, Respondent is a large quantity generator of hazardous waste, as set out in the applicable regulations.

On September 1, 2006, upon motion, Complainant filed a Second Amended Complaint ("Complaint"). The Complaint charges MMF with the following five counts of violation, in brief:

> Count 1: Respondent failed to adequately train certain of its employees, as well as create and maintain records of such training and employee job titles and descriptions, in violation of Minn. R. 7045.0558, Subparts 1-3, 5, 6.A-D (40 C.F.R. §§ 265.16(a)(1)-(3), (b), (c), (d)(1)-(4));
>
> Count 2: Respondent failed to include in its facility's Contingency Plan an evacuation plan, a named primary emergency coordinator, office telephone numbers for emergency coordinators, arrangements agreed to by local emergency

responders, and identification of emergency equipment capability, in violation of Minn. R. 7045.0572, Subparts 4.C-F (40 C.F.R. §§ 265.52(c)-(f));

Count 3: Respondent failed to maintain and operate its facility to minimize the possibility of fire, explosion, or any unplanned release to air, soil or water of hazardous waste or hazardous waste constituents, in violation of Minn. R. 7045.0566, Subpart 2 (40 C.F.R. § 265.31);

Count 4: Respondent failed to provide its employees with immediate access to an internal alarm or emergency communication device, and a device to summon external emergency responders, in violation of Minn. R. 7045.0566, Subparts 3.B and 5 (40 C.F.R. §§ 265.32(b) and 265.34(a)); and

Count 5: Respondent failed to qualify for a conditional generator exemption from the hazardous waste storage facility permit and operational requirements, and failed to obtain a permit from federal or state authorities for the storage of hazardous waste, in violation of Minn. R. 7001.0030 and 7001.0520, Subpart 1.A.

The Complaint proposes an aggregate civil penalty of $300,000 for the violations and requests a Compliance Order. Respondent filed an Answer denying the violations and raising affirmative defenses, including the failure to state a claim. The parties each filed prehearing exchanges, and several motions which have been ruled upon.

On March 2, 2007, Respondent submitted a Motion for Leave to File Supplemental Prehearing Exchange ("R's Motion to Supplement") along with a supplement to its Prehearing Exchange. Complainant did not submit any response to the Motion to Supplement. On March 5, 2007, Complainant filed a Motion to Supplement Prehearing Exchange ("C's Motion to Supplement") along with its Second Supplement to its Prehearing Exchange. Respondent did not file any response thereto. Also on March 5, Complainant filed a Motion In Limine, along with a Memorandum of Law in Support (collectively, "Motion in Limine"). On March 23, 2007, Respondent submitted a Memorandum of Law in Opposition to Complainant's Motion in Limine ("Opposition").

The hearing in this matter is scheduled to commence on May 22, 2007.

II. Respondent's Motion to Supplement

Respondent seeks to supplement its Prehearing Exchange with additional exhibits (Respondent's Prehearing Exchange Exhibits ("R's Exs.") 109 through 141, and three witnesses: Bruce Mair, Mike Logan, and Phyllis Strong. Mr. Mair would provide expert testimony as to Respondent's financial condition, ability to pay the penalty or continue in business, as a substitute for Mr. Kahler, who was previously listed as a witness. Mr. Logan is an employee of MMF and Ms. Strong is an inspector employed by the Minnesota Pollution Control Agency ("MPCA") who inspected MMF's plant.

In its Motion to Supplement, Respondent states that on February 21, 2007, it notified Complainant's counsel in writing that it planned to file a motion to supplement the prehearing exchange to add the three witnesses and include additional exhibits, and that Complainant's counsel responded that he did not object to Respondent including Bruce Mair or Mike Logan as witnesses, but had concerns about including Phyllis Strong as a witness.

The Consolidated Rules of Practice provide at 40 C.F.R. § 22.16(b) that "any party who fails to respond [to a motion] within the designated time period [of 15 days after service of the motion] waives any objection to the granting of the motion." Accordingly, and given the lack of response from Complainant, Respondent's Motion to Supplement is granted.

III. Complainant's Motion to Supplement

Complainant seeks to supplement its Prehearing Exchange to add two proposed expert witnesses, Dr. Christopher Weis, a toxicologist, and Dr. Douglass Kendall, a chemist, and to provide their curriculum vitae and other background information. Given the lack of response from Respondent, and under 40 C.F.R. § 22.16(b), Complainant's Motion to Supplement is granted.

IV. Complainant's Motion in Limine

A. Complainant's Arguments

In its Motion in Limine, Complainant seeks to exclude twenty of Respondent's Prehearing Exchange Exhibits, namely R's Exs. 8-10, 13-20, 23-28, 101, 102, and 106 and specified portions of four other exhibits, namely pages R000310-R000312 of R's Ex. 7, pages R00351-R000352 of R's Ex. 21, pages R000354-R000357 and R000359 of R's Ex. 22, and pages R000382-R000385 of R's Ex. 30. Complainant notes in its Motion that most of these documents (R's Exs. 7, 8, 13-23, 27, 28, 30, 101) are relatively old, dating from 1983, 1988, 1991 or 1992, that the violations at issue occurred in between August 2000 and August 2005, and that there were more recent inspections and correspondence by Hennepin County or EPA from 1993 through 2005. Therefore, Complainant argues, these older documents are irrelevant, of no probative value and are unduly repetitious in regard to Respondent's defense of lack of notice of the regulatory requirements based on the inspectors' failure to find or notify Respondent of violations, as the relevant time period of violations is August 2000 through 2005.

Another reason Complainant offers for excluding some of theses documents is that they pertain to the fire code of the City of Minneapolis (R's Exs. 101, 102 and 106), Occupational Safety and Health Act violations (R's Ex. 19), wastewater treatment and venting (R's Exs. 18, 23), or Reports of Laboratory Analysis for demonstrating compliance with the Clean Water Act (R's Ex. 7), and not Federal or state hazardous waste rules.

A further basis offered for excluding many of the documents are that many of them (R's Exs. 8, 9, 10, 13, 14, 16-20, 23-28) are authored by employees of the Hennepin County or the Minnesota Pollution Control Agency ("MPCA") who are not identified as witnesses in the Prehearing Exchange, and Complainant's witnesses did not perform the inspections they relate to and did not create or send them to MMF. While Mr. Henderson is listed as inspector on R's Ex. 16, and is listed as a witness, Respondent's summary of his testimony does not indicate he will testify regarding any inspection. The documents cannot be authenticated Complainant asserts, and therefore, would be irrelevant or immaterial.

In addition, Complainant seeks to exclude the testimony of Respondent's proposed witnesses Mr. Robert Dullinger and Mr. Joseph Henderson, on the basis that the Respondent's summary of their proposed testimony states that they will testify as to the delegation of the State of Minnesota to implement the RCRA program, and as to MPCA's initiatives to obtain compliance with metal finishing operations. Complainant argues that neither of these subjects is relevant or material to the remaining issues of liability or the penalty in this proceeding. Further, the delegation of authority to Minnesota is a legal issue, and legal opinion evidence is irrelevant and immaterial to the factual issues to be addressed at a fact-gathering evidentiary hearing. Complainant asserts that, to the extent their testimony addresses the legal consequences of delegation, their testimony is not likely to be reliable without a showing of their qualification for such testimony. Complainant asserts that Respondent has not indicated the relevance of any particular compliance initiatives, and that any testimony of policy or enforcement against other facilities is irrelevant and immaterial to the issues at hand.

B. **Respondent's Opposition**

Respondent argues that Complainant's request to exclude testimony and exhibits is inconsequential, unsupported, and premature. Respondent asserts that over the years it has relied on MPCA and Hennepin County inspectors for compliance advice, determinations and approvals of its training, contingency plans, operation and maintenance, and communications devices, and modified its hazardous waste management practices according to their directives. Respondent asserts that the evidence Complainant seeks to exclude is relevant to impeach Complainant's expected testimony that its training, plans operations and devices are now inadequate, and is relevant to whether Respondent had adequate notice of the conduct required or prohibited. Further, Respondent asserts, it is relevant or one or more penalty factors in the RCRA Penalty Policy, which provides for a decrease in the penalty if a respondent reasonably and in good faith relies on written statements by the state or EPA that an activity satisfies RCRA requirements.

Respondent argues that many of the documents Complainant seeks to exclude are government records kept in the ordinary course of administration by MPCA or Hennepin County. Respondent asserts that it has listed persons in its Prehearing Exchange who can authenticate the documents, including MPCA's records custodian, Phyllis Strong, Mr. Ludwig to whom many exhibits were directed, and Hennepin County personnel identified as witnesses by Complainant. Respondent asserts further that it can submit affidavits of records custodians, if necessary, citing to 40 C.F.R. § 22.22(d).

Respondent argues that authentication objections are not appropriate for motions in limine, as parties are not required to authenticate pre-hearing exchange exhibits or explain their relevancy.

Respondent points out that the laboratory analysis of wastewater shows that wastewater from MMF's hazardous waste neutralization/pretreatment/wastewater treatment process were in compliance with Metropolitan Waste Control Commission, and that MMF will offer testimony as to its design, operation and approvals from local authorities.

As to documents pertaining to the fire department, Respondent states that it named a fire inspector as a witness to testify as to conditions and hazards at MMF's plant, storage areas, and communications devices, and this evidence is relevant to Complainant's allegations that MMF violated the preparedness and prevention rule and failed to have a device capable of summoning the fire department.

Respondent asserts that Mr. Henderson of MPCA will testify regarding the role of counties in conducting inspections and referring matters to MCPA and/or EPA, and MPCA initiatives such as training that was given to metal finishing operations, including some of MMF's employees. He accompanied Ms. Strong on an inspection of MMF's facility in 1991. Respondent will elicit his interpretation of the rules at issue and how he applied them to MMF's training, contingency plan and operations. Respondent points to the following language in *Strong Steel Products, LLC*, EPA Docket Nos. RCRA-5-2001-0016, CAA-5-2001-0020 & MM-5-2001-0006 (ALJ, Oct. 27, 2003), slip op. at 22: "In administrative enforcement proceedings, each party may submit its own interpretation of EPA's regulations, and the Presiding Judge in the decision will independently interpret the relevant regulations . . . ."

Respondent states that it does not intend to introduce additional evidence regarding sufficiency of EPA's notice to the MPCA, so MMF will not be presenting Mr. Dullinger as a witness.

C. **Discussion**

Standards Relevant to Motions in Limine

The Consolidated Rules of Practice ("Rules") provide that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . . ." 40 C.F.R. § 22.22(a)(1). In Federal court practice, a motion in limine "should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000). Motions in limine are generally disfavored. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). If evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial so questions of foundation, relevancy, and prejudice may be resolved in context. *Id.* at 1401. Thus, denial of a motion in limine does not mean that all evidence contemplated by the motion will be admitted at trial. Rather, denial of the motion in limine means only that without

the context of trial the court is unable to determine whether the evidence in question should be excluded. *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989).

Aged documents

The mere fact that documents are from inspections prior to those at issue, or concern time periods before the alleged violations, does not render them irrelevant, of no probative value and are unduly repetitious. Indeed, Respondent's defense of lack of notice of the regulatory requirements due to the inspectors' observations and notations of compliance is based on the inspections in the years prior to the alleged violations. *See*, Order on Complainant's Motion for Accelerated Decision on Liability, Jan. 9, 2007. Furthermore, these documents may be relevant to the penalty assessment, and there is no particular time limitation, or statute of limitations, for admissibility of facts that may be relevant to the penalty assessment. The age of the documents and number of succeeding inspections may be considered with respect to the weight of the evidence, but not with respect to its admissibility.

Documents not addressing hazardous waste

The fact that some of Respondent's exhibits pertain to the fire code of the City of Minneapolis, Occupational Safety and Health Act violations, wastewater treatment and venting, or Reports of Laboratory Analysis for demonstrating compliance with the Clean Water Act, does not render them inadmissible. They may indicate conditions observed at the facility, and thus may be relevant at least as to Count 3 and as to any penalty assessment. Features of Respondent's neutralization/pretreatment/wastewater treatment facility, such as Pit 1 and Pit 2, and the filter press, are mentioned in Complainant's documents submitted in support of Count 3, and facts as to MMF's wastewater may be relevant to Count 3. Therefore, documents will not be excluded on the basis that they do not directly address hazardous waste.

Authentication

Authentication is the act of proving that something, such as a document, is true or genuine so that it may be admitted into evidence in a contested proceeding. Black's Law Dictionary, 127 (7th Ed. 1999); *United States v. Mulnelli-Navas*, 111 F.3d 983 (1st Cir. 1997) (authenticity of exhibit is established if enough evidence is introduced to show that the exhibit is what the proponent says it is). In federal court, Federal Rule of Evidence (FRE) 901 requires the authentication of exhibits prior to their admission into evidence. The only rule of evidence applicable to this administrative proceeding is 40 C.F.R. § 22.22(a), quoted above, but the fact that administrative proceedings are not governed by the FRE "does not completely obviate the necessity of proving by competent evidence that real evidence is what it purports to be," and "absent any such proof, the evidence to be admitted would be irrelevant or immaterial and hence should be excluded from the proceeding." *Woolsey v. NTSB*, 993 F.2d 516 (5th Cir.

1993)(documents requested by FAA investigations showed no signs of forgery and were admitted) (quoting *Gallagher v. National Transportation Safety Board*, 953 F.2d 1214, 1218 (10th Cir.1992). A condition precedent to admissibility of a document is authenticity, that is, evidence to support a finding that the matter is what its proponent claims. *See,* FRE 901(a).

Looking to the FRE for guidance, authenticity for public records or reports may include proof of custody: evidence that a writing authorized by law was in fact filed or recorded in a public office, or evidence that a purported report or statement is from the public office where items of this nature are kept. FRE 901(b)(7). The author of the document thus is not required to testify to authenticate such documents. Furthermore, Phyllis Strong, the author of and inspector involved with several of the documents, is now included as a witness in Respondent's Prehearing Exchange, as its Motion to Supplement is granted, above. In addition, Respondent may obtain testimony from Complainant's witnesses to authenticate documents. *See, Woolsey, supra*. <u>That being said, both parties are strongly encouraged to, in good faith and to the greatest extent possible, stipulate to authenticity and admissibility of each others' proposed exhibits and witnesses prior to the hearing, so that the limited time allocated therefor can be utilized for acquiring evidence of substantive matters in dispute</u>.

Respondent therefore may be able to authenticate the documents at issue through the witnesses listed in the Prehearing Exchanges, stipulations, or if necessary, any additional witnesses listed in a motion to supplement the prehearing exchange or affidavits of any additional public records custodian. The hearsay exception set forth in FRE 803(6) would appear to allow affidavits of records custodians as an exception to the requirement in 40 C.F.R. § 22.22(d) that affidavits are admissible only where the affiant is "unavailable" within the meaning of FRE 804(a). Respondent is hereby reminded that the Rules at 40 C.F.R. § 22.19(a) provides that documents and testimony of witnesses that have not been included in the prehearing exchange shall not be admitted at the hearing.

Thus, at this point in the proceedings, Complainant has not shown that the documents it seeks to exclude cannot be authenticated and/or are irrelevant, immaterial, unreliable, or of little probative value.

<u>Testimony of Mr. Henderson</u>

Respondent cites to *Strong Steel Products, LLC,* EPA Docket Nos. RCRA-5-2001-0016, CAA-5-2001-0020 & MM-5-2001-0006, 2000 EPA ALJ LEXIS 191 *60-61 (Order on Motions for Leave to File Amended Complaint and to Strike Defenses and Motions in Limine, Oct. 27, 2003) for the notion that legal opinion evidence is not a valid ground for exclusion of testimony.

In that case, the respondent moved to exclude testimony of an expert as to used oil. The complainant proposed that her testimony would explain the used oil regulations, the state's authorization to implement the program and its impact on the regulations, her review of the facts

supporting the alleged violations, and the reasonableness of the proposed penalty, including the risk of exposure from mismanagement of used oil. The complainant stated that she had participated in developing the used oil regulations and had interpreted and applied the regulations for many years. The motion in limine was denied on the basis that she may be able to testify as to any aspect of the penalty for which she is shown to be qualified, such as testimony as to the seriousness of the violations in terms of the risk of harm to human health or the environment from the alleged violations. The following discussion addressed other aspects of her proposed testimony:

> In administrative enforcement proceedings, each party may submit its interpretation of EPA's regulations, and the Presiding Judge in the decision will independently interpret the relevant regulations and apply them to the findings of fact. The interpretation starts with the plain language of the regulation, and any ambiguities are resolved under principles of statutory (and regulatory) construction and interpretations set forth in applicable case precedent. Testimony, however, by a witness as to what EPA intended or expected the regulation to mean, but did not express so as to provide fair notice, may not be considered by courts or administrative tribunals in interpreting a regulation. Therefore such testimony is not admissible. However, testimony which states the *witness'* own understanding of what the regulation means may assist the Presiding Judge in understanding the witness' factual or expert testimony, and may be admissible. Testimony which simply explains, as a matter of background, the regulatory scheme, or any relevant changes in the regulations, may assist the Presiding Judge at the hearing in understanding the factual testimony, and is admissible.

Strong Steel, 2000 EPA ALJ LEXIS 191 at *60-61; slip op. at 22. That is, the *parties* through counsel (or pro se) may *submit* their interpretations of regulations: in briefs, motions, legal memoranda, opening or closing statements at the hearing, or in any oral argument granted by the Presiding Judge. This does *not* mean that a *witness' testimony* as to interpretation of regulations is admissible. Such testimony *may* be admissible *if* it merely states the witness' own understanding of the regulation *and* it assists the Presiding Judge to understand the witness' factual or expert testimony. Testimony which merely summarizes – explains simply as a matter of background the regulatory program or framework or any relevant changes in the regulations, generally is not a subject of contention and therefore may be admissible where it merely provides an introduction to factual or expert testimony.[1] To the extent that it is contested, or at

[1] The Administrative Law Judges are generally familiar with the statutory programs under which EPA enforcement actions are brought and the regulatory framework and issues in the cases they preside over. Therefore, testimony as to regulatory programs usually is unnecessary. However, some of the regulations implementing such programs may be scientifically complex or highly technical, inviting an overview thereof – preferably, in prehearing briefs, opening statements at the hearing, or stipulated written testimony prepared in

the point where the testimony represents an interpretation which is not shared by the opposing party, the latter is free to object to the testimony at the hearing. On the other hand, legal opinion testimony, or testimony as a legal expert on interpretation of a regulation, such as testimony as to what EPA intended or expected the regulation to mean, is not admissible.

Respondent does not represent that Mr. Henderson would provide testimony solely in the nature of a legal expert opinion. His testimony as described by Respondent would include facts as to the inspections, referrals and relationships among the county, MPCA and EPA, and training provided by MPCA to MMF employees. These facts, to the extent that they pertain to MMF, may be relevant to the penalty assessment. Any testimony as to his interpretation of the regulations at issue and their application to MMF's activities and operations may provide perspective or context to the facts he testifies to, and admissibility of such testimony cannot be determined at this point, but must be addressed at the hearing. Therefore, Complainant's request to exclude Mr. Henderson's testimony is denied.

ORDER

1. Respondent's Motion for Leave to File Supplemental Prehearing Exchange is GRANTED.

2. Complainant's Motion to Supplement Prehearing Exchange is GRANTED.

3. Complainant's Motion in Limine is DENIED.

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Susan L. Biro
Chief Administrative Law Judge

Dated: April 23, 2007
Washington, D.C.

advance of the hearing.